LOS ANGELES BAR BULLETIN

In This Issue

VOL. 25 JANUARY, 1950 NO. 5

Los Angeles
BAR BULLETIN

Official Monthly Publication of The Los Angeles Bar Association. Entered as second class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.00 a Year; 10c a Copy.

VOL. 25 JANUARY, 1950 No. 5

A WORD FROM THE PRESIDENT

Clarence B. Runkle

Complaints are frequently heard from attorneys about defects or inequities in the statutory law.

Good statutory law, like good horticulture, results from a process, not only of careful planting, but also of intelligent and systematic pruning. The operator should be skilled in his craft. There could be no better source of additions or amendments than the actual experience of practicing lawyers. Our members have the opportunity and, I think I should all, the duty to participate in this important work.

The Conference of Bar Delegates, at its annual meeting in conjunction with the convention of the State Bar, weighs suggested statutory changes and recommends for adoption those it approves. Much useful legislation has thus been sired. The suggestions come from practicing attorneys, usually through their local associations which are represented in the Conference.

Our delegation of forty-four to the next Conference to be held here in Los Angeles in October, is now being appointed. Your suggestions or proposals for statutory changes, fully drafted, must be submitted for its preliminary consideration not later than March 15, 1950, but the earlier the submission the greater the chance of careful and favorable action.

Submissions may be made through the Association's office.

* * *

The Christmas Hi-Jinx, held December 16th at the Breakfast Club, was an outstanding success. I express, for the Association, our warmest appreciation of the devotion and energy of

the Committee and the cast and all the helpers. Under the able leadership of Albert Lee Stephens, Jr., who accepted the assignment at a belated hour, they did a fine job. Space does not permit mention of all their names, but they have already been publicized to the Membership and they are urged to accept this assurance of our heartfelt gratitude.

* * *

The Greetings of the Season to all our Members and their dear ones. May you have a most prosperous and happy 1950.

CLARENCE B. RUNKLE.

LANGUAGE FROM THE SUPREME COURT

In the case of *Bay Ridge Operating Co. v. Aaron* (June 7, 1948), Mr. Justice Reed, speaking for the majority, said:

> "We therefore hold that overtime premium, deductible from extra pay to find the regular rate of pay, is any additional sum received by an employee for work because of previous work for a specified number of hours in the work week or workday whether the hours are specified by contract or statute."

And

> "According to the Administrator's interpretation, an employer may credit himself with an amount equal to the number of hours worked in excess of forty multiplied by the regular rate of pay for the entire week rather than an amount equal to the number of hours worked in excess of forty multiplied by the average rate of pay for those excess hours. Under that formula each respondent is entitled, as statutory excess compensation, to an additional sum equal to the number of hours worked for one employer in a work-week in excess of forty, multiplied by one-half the regular rate of pay. On the record before us, that interpretation seems to be a reasonable one; we leave a final determination of the point to the District Court on further proceedings."

Mr. Justice Frankfurter, as one of the three dissenters, opened his dissent by saying:

> "The Court's opinion is written quite in the abstract. It treats the words of the Fair Labor Standards Act as though they were parts of a cross-word puzzle."

MORAL TURPITUDE AND THE INCOME TAX

By John H. Wahl, Jr.

EDITOR'S NOTE: Mr. Wahl, of the Miami, Florida, Bar, has written so engagingly with respect to a phase of Federal Taxation in the Florida Law Journal (May, 1949), that permission was sought and graciously granted to republish his article. The Editors, of course, shall not be deemed to be suggesting that this presentation has any "bread and butter" quality so far as the members of this Association are concerned, but the article is submitted as worthy of attention for its literary style in connection with legal writings.

SPEAKING for the majority of the United States Supreme Court, the late Mr. Justice Murphy recently announced that "moral turpitude is not a touchstone of taxability." This was a prelude to the Court's decision that one Laird Wilcox, who had embezzled and subsequently dissipated in Reno gambling houses some twelve thousand odd dollars, was free of any liability to pay income tax thereon.[1]

Wilcox was a bookkeeper and his defalcations were accomplished by withholding cash payments from his employer's customers. Having control of the books no one suspected his activities and certainly not their extent until he had gotten away with $22,896.01. Of this total approximately $12,000 was purloined during 1941, and it was that taxable year which was under review. In the light of the Court's decision the proceedings were discontinued in respect of the $10,000 embezzled in 1942.

The majority based its decision upon the proposition that Wilcox was legally liable to make restitution and thus the funds did not constitute taxable income under the statute.[2]

Mr. Justice Burton dissented. He said, in effect, that any liability to restore the funds was purely theoretical because they had been completely dissipated. He endorsed the philosophy that tax liability should rest "upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him upon that basis."[3] He intimated that here was scarcely more conclusive evidence of such possession and enjoyment than for Wilcox to have lost the money across the gambling table.

1. Commissioner v. Wilcox, 327 U. S. 404, 90 L. Ed. 752.
2. 26 U. S. C. A. 22 (a).
3. Burnet v. Wells, 289 U. S. 670, 77 L. Ed. 1439.

He pointed to the double loss to the Government which resulted from the fact that while Wilcox did not have to pay a tax his employer could treat the sums embezzled as a loss and deduct them from his own taxable income.[4]

Justice Burton then very pointedly (but fruitlessly) recalled several precedents which he considered directly analogous and diametrically opposed to the majority's reasoning in the instant case.

He pointed to at least two previous cases wherein embezzled funds had been held to be taxable income.[5]

He reminded them of the taxpayer on the accrual basis who loaned money at usurious rates and was required to pay tax upon the increment even though unpaid and notwithstanding the fact that usurious interest, being unlawful, was of doubtful collectibility.[6]

He reviewed the case wherein a railroad company was required to report as taxable income amounts representing fare overcharges which, under the law, were refundable to the passengers who paid them.[7]

He suggested review of the case of a corporate official who was taxed on an illicit bonus in the form of bonds which he unlawfully withheld from the corporation.[8]

He directed attention to the case of the attorney who fraudulently misapplied moneys received from his client with which to settle certain damage claims, and unsuccessfully disputed the right of the Government to tax the money as income to him.[9]

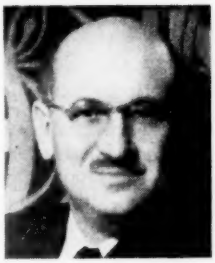
---

4. Somewhat analogous to the formerly existing situation wherein some close held corporations on the accrual basis charged on their books and deducted from income a salary credited to a stockholder employee, family members, etc., who, on a cash basis, was not required to pay any tax thereon unless and until the salary was actually paid. All too frequently, the Government found, the corporation never managed to get around to writing a check, thus never relieving or eliminating the "hiatus." The same system likewise was used in respect of interest, rent, etc. Finally in 1937 Congress plugged that particular loophole by 26 U. S. C. A. 24(c). (See Hearings Before Joint Committee on Tax Evasion and Avoidance, 75th Congress, 1st Sess. pp. 241, 242; Ways and Means Committee Report No. 1546, 75th Congress, 1st Sess. pp. 16, 29. Also Musselman Hub-Brake Co. v. Commissioner, 139 F. (2) 65.
5. Kurrle v. Commissioner, 126 F. (2) 723; Spruance v. Commissioner, 43 B. T. A. 221, reviewed in McKnight v. Commissioner, 127 F. (2) 572.
6. Barker v. Magruder, 95 F. (2) 122.
7. Chicago etc. R. Co. v. Commissioner, 47 F. (2) 990. Cf. National Airlines v. Commissioner, 9 T. C. 159.
8. National City Bank v. Helvering, 98 F. (2) 93.
9. U. S. v. Wampler, 5 F. Supp. 796.

(Continued on page 147)

"COPYCATS!"

By C. G. Stratton*



C. G. Stratton

THERE is a distinct feeling in the legal fraternity, as well as among laymen, that if an article is not patented, it can be copied in its entirety with impunity.

While a patent is a means for preventing a competitor from copying a person's goods, it is not the only means. "A court of equity will not allow a man to palm off his goods as those of another."[1]

It seems clear from the cases that essential, functional details may be copied. It is only when the competitor starts copying the non-essential features, that liability begins. An example is the copying of a fender-guard for protecting the rear fender of an automobile (most cars have them). They protect the rear fenders from flying gravel, etc.

An essential feature of such fender-guards would probably be that the back face of them will have to fit against the fender. However, a non-essential feature would be the particular size and shape. These guards can be an almost limitless number of shapes. Since the particular size and shape of any fender-guard is not essential, the direct copying of the particular size and shape of a competitor's fender-guard would appear to come within this rule against "palming off" one's goods as those of a competitor.

The question of secondary meaning is often referred to in cases of this character. Judge Yankwich, of our own United States District Court, in the well considered case of Brooks Bros. v. Brooks Clothing of Calif., 60 F. Supp. 442, stated:

> "In making these rulings, the courts have also given practical application to the doctrine of secondary meaning, which seeks to protect 'a person against harm to his business which the actor might cause by misleading prospective purchasers into identifying the actor's goods, services or business with those of the other'."

In another California case, where a plaintiff manufactured a child's one-piece garment and the defendant manufactured a garment which was an exact simulation of plaintiff's, not only in

---

*C. G. Stratton is a former editor of the Bar Bulletin, and specializes in the patent, trade-mark and copyright field.

[1]Enterprise Mfg. Co. v. Landers, 131 F. 240, 65 CCA 587.

essentials, but also in such non-essentials as piping and buttons, an injunction was granted.[2]

In Lovell-McConnell Mfg. Co. v. American Ever-Ready Co., 195 F. 931 (CCA 2), the court enjoined the sale of a confusingly similar automobile horn, even though the name plates on the horns were distinguishable, in the following language:

> "The resemblance between complainant's and defendant's horns is great. It is difficult to tell the one from the other without an inspection so close as to read the inscription on the name plates. . . . Such a manifest imitation in details of construction, with the consequent likelihood of confusion, should be prevented."

The law in this connection is well stated in Rushmore v. Manhattan Screw & Stamping Works, 163 F. 939 (CCA 2):

> "The question is whether plaintiff is entitled to be protected from unnecessary imitation of nonfunctional parts of his well-known lamp. It seems to me that under the cases of Enterprise Mfg. Co. v. Landers, 131 Fed. 240, 65 C.C.A. 587, and Marvel Co. v. Pearl, 133 Fed. 160, 66 C.C.A. 226, he is so entitled. We are thus confronted with the naked question of law—can one who manufactures and sells a well-known article of commerce, like an automobile search light enclosed in a shell of graceful but unpatented design, maintain a bill for an injunction, profits and damages against a defendant who sells automobile search lights enclosed in a similar shell, with his name prominently appearing thereon as the maker, and who has never represented that his lamps were made by the complainant? We feel constrained to answer this question in the affirmative . . ."

Finally, an excellent statement of the law on this point was made in McGill Mfg. Co. v. Leviton Mfg. Co., 43 F. 2d 607, 608:

> "There is no dispute between plaintiff and defendant as to the law that the plaintiff is entitled to recover in an action for unfair competition when the defendant, a competitor, has unnecessarily and knowingly imitated his rival's devices to such an extent that purchasers are likely to be deceived by the resemblance of the devices, and where the general appearance of the devices are practically the same."

---

[2]Levi Strauss & Co. v. Cooper, Coate & Casey, 12 Trade-Mark Reporter 62 (Calif. Superior Ct. 1921), cited in Nims on Unfair Competition and Trade-Marks, 4th Ed., page 384, footnote 8. See also Banzhof v. Chase, 150 Cal. 180, 88 Pac. 704.

THE SHARON CASES: A Legal Melodrama of the Eighties

PART TWO†

By Donald W. Hamblin*

Donald W. Hamblin

WHILE Sarah's divorce action was being prosecuted with vigor and considerable early success, the action commenced by Sharon in the federal court was making slow progress. Evidently Sarah's attorneys believed that her salvation depended upon reaching a decision in the state court before the determination of Sharon's federal equity suit. A demurrer, a plea in abatement, and a plea to the jurisdiction on the ground that Sharon was a citizen of California consumed much time, with the result that Sarah was not required to file her answer in the federal court until a few days after the favorable decision in the Superior Court. Thus, Sarah's attorneys were able to set up in her answer, among other defenses, the proceedings and decree of the state court adjudging the marriage contract to be legal and and genuine and the parties to be husband and wife.

The testimony in the federal case was taken before an examiner during the summer of 1885. Sarah's conduct during the state court trial was trifling compared to her violence during the federal proceedings. She was in constant attendance before the examiner, and she frequently interrupted the proceedings by her turbulent conduct and language, punctuated by threats against the life of Sharon's counsel. She constantly carried a pistol, and on several occasions played with it during the examination of other witnesses, pointing it first at one and then another, and promising to kill them at some stage of the proceedings. Sarah's conduct became so appalling that the examiner had to adjourn the proceedings and appeal to the judges to enforce order. It was ordered that Sarah be disarmed and that a deputy marshal should sit constantly at her side to restrain her.

In December, 1885, a year after the interlocutory decree of

---

*Of the Los Angeles Bar. For a brief biographical sketch of Mr. Hamblin, see 25 LOS ANGELES BAR BULLETIN, 101.

†Part One appears in 25 LOS ANGELES BAR BULLETIN, 101 (December, 1949).

divorce was granted, the Circuit Court of the United States announced its decision. In complete conflict with the decision of the state court, it adjudged the purported marriage contract a forgery, and ordered that the contract be delivered within twenty days to the clerk of the court for cancellation. It further enjoined Sarah from asserting the genuineness of her marriage contract, or from using it in any way to support her claims as wife of Sharon. Sarah had testified that the marriage contract, which was admittedly in her handwriting except for the purported signature of Sharon, had been dictated to her by Sharon, who then signed it. Federal Judges Deady and Sawyer concluded that the signature of Sharon had been written before the balance of the document. Gumpel, Sarah's handwriting expert who gave his opinion that the signature of Sharon was genuine, in both the federal and state court trials, had earlier been employed by Sharon. During the course of that employment, he (being, as Judge Deady said, "a very remarkable penman") had written Sharon's signature several times to show how it could be imitated. Both federal judges concluded that the signature of Sharon on the questioned document looked more like Gumpel's imitation than the admittedly genuine signature of Sharon, but they were not quite willing to find that Gumpel was the author of Sharon's signature on the marriage contract.

A little more than a month before the federal decision was rendered Senator Sharon died, but the decree was entered as of the date of submission of the cause, which was one day prior to Sharon's death. A few days after the decision was announced, Sarah married her attorney, David S. Terry. Terry took what he believed were the necessary steps to perfect an appeal to the Supreme Court of the United States and turned his major attention to the pending state court proceedings. However, he overlooked the effect of Sharon's death, and as a result the Circuit Court's judgment in Sharon's favor became unappealable in January, 1888. Sharon's representatives waited quietly until Terry could not cure his mistake of procedure, and then commenced new suits against Sarah and Terry in the United States Circuit Court. These were bills of revivor brought by Senator Sharon's son, as executor, and by his son-in-law, Congressman Newlands of Nevada (to whom Sharon had transferred in trust most of his vast estate shortly before his death) seeking to have the previous judgment

Editor in charge of this issue—John L. Martin.

of the federal court in Sharon's favor revived in their names and for their benefit and carried into execution.

JUSTICE FIELDS ENTERS THE DRAMA

By law and practice the Justices of the Supreme Court of the United States were still required to "ride circuit." Thus, Justice Field, as Circuit Justice of the Ninth Circuit was called upon to participate in the decision of the revivor suits. Justice Field entered the drama as it was reaching new heights of bitterness and tension. The marriage of Sarah and Judge Terry had united two of the most explosive temperaments in California. Terry's wife and two sons had died, one by suicide, shortly before his marriage to Sarah, and of course his marriage to this unconventional, notorious young woman had closed many doors which had formerly been open to him. No doubt Southern pride and chivalry, as well as Terry's own iron determination, had their influence, and Terry was resolved that no court should find, in effect, that he was the dupe or co-plotter of the discarded mistress of a licentious old millionaire. He introduced a bill in the state legislature to remove from office, on the ground of incompetency, two of the Supreme Court Judges who had voted against Sarah on the ap-

(Continued on page 139)

Silver Memories

Compiled from the Daily Journal of January, 1925
By A. Stevens Halsted, Jr., Associate Editor

A. Stevens Halsted, Jr.

THE laying of the cornerstone of the new $6,000,000 Hall of Justice this month was attended by the justices of the Supreme Court and representatives of the bench and bar of Los Angeles County. Hon. **L. H. Valentine,** Presiding Judge of the Superior Court, presided at the ceremony. Speeches were delivered by Hon. **Boyle Workman,** acting mayor; Hon. **Robert M. Clarke,** President of the County Bar Association, and Hon. **Benjamin F. Bledsoe,** Judge of the United States District Court. Justice **John W. Shenk** spoke on behalf of the California Supreme Court.

Judge **Charles Monroe** was seven minutes late to court and in accordance with his usual custom towards those who are late, fined himself $1.00 a minute with an alternative of seven days in jail. He paid a fine, and Court Clerk **Harry Moore** took charge of the money and paid it into the County Treasury.

* * *

Secretary of the Navy **Curtis D. Wilbur** has announced the scope and purpose of the secret board recently appointed at the suggestion of President Coolidge to inquire into the relative values of aircraft and battleships. The board will investigate the worth of a united air service as compared with the separate branches of the Army and Navy; the utility of the airship in defense attack, with and without the aid of surface vessels; investigation of types of planes now on hand and which may be developed; and the need for an adequate air defense.

* * *

Rex Hardy, Harry Williams Elliott and **Fred Aberle, Jr.** have formed a new law firm. **Goodwin J. Knight** and **Thomas Reynolds** have also formed a new law partnership.

THE SHARON CASES

(Continued from page 137)

peal from the divorce judgment. He made it clear that he intended to hold the judges of the Supreme Court of California personally responsible for any adverse decision in the pending appeal from the order denying Sharon a new trial. He took the position that any denial of Sarah's claim as Sharon's widow was an insult which could only be atoned by the blood of the person who made it. Both Terrys bitterly and frequently denounced the federal judges who had consistently ruled against them. The acts and utterances of the Terrys had been well publicized, and the public, as well as the protagonists, were aware of the crucial significance of the decision in the revivor suits.

Hence, on the morning of September 3, 1888, when the decision of the Circuit Court was to be announced, the federal courtroom in San Francisco was packed with sensation-seeking spectators and several United States Marshal's deputies, who had good reason to expect a dramatic and possibly disorderly scene.

A few minutes before the opening of court, the Terrys took their position at the counsel table a few feet from the bench. As it presently developed, they were both on a war-footing, he carrying a knife with a five-inch blade and she a loaded .41-calibre revolver hidden in a small handbag. Soon Justice Field and Judges Sawyer and Sabin took the bench and Justice Field commenced to read the decision to a courtroom quiet with expectancy.

THE OPINION

When Justice Field had read about one-third of a long opinion, and before it was entirely clear which way the decision was to go, Sarah suddenly sprang to her feet and placing her handbag before her on the table, demanded of Field,

"Judge, are you going to take the responsibility of ordering me to deliver up that marriage contract?"

Justice Field stopped reading and said firmly but quietly, "Madam, sit down."

"You have been paid for this decision!" shrieked Sarah. "How much did Newlands pay you? Everyone knows you were sent out here by Newlands to make this decision!"

"Mr. Marshal," said Field, with stern dignity, "remove that woman from the courtroom."

Instantly, the courtroom was in an uproar. As Marshal Franks stepped toward Sarah, she sprang at him and slapped him in the face, crying, "You dirty scrub, you dare not remove me from this courtroom."

Terry was on his feet and crowded between the Marshal and Sarah, crying, "No god-damned man shall touch my wife. Get a written order." As the Marshal reached for Sarah's arm, Terry hit the Marshal a terrific blow in the mouth, breaking one of his teeth, and knocking him back across the room. A group of deputies overpowered Terry and held him on his back, with his hand well away from the knife for which he appeared to be reaching.

Meanwhile the Marshal, with the assistance of a deputy, dragged Sarah from the courtroom to the Marshal's office, she struggling, kicking and scratching as she went, pouring out imprecations upon Judges Field and Sawyer, and screaming that she would kill them both.

When Sarah had been taken to the Marshal's office, Terry's captors released him. He promptly made for the door to join his wife, but the crowd was such that he could not break through. He reached inside his coat and drew his bowie-knife, as if to cut his way out. Another fierce struggle ensued; Terry ignored a gun at his head and finally relinquished his weapon as one of the deputies was about to draw the blade through his fingers. Sarah's revolver was removed from her satchel, and the disarmed Terrys spent the next few hours under guard in the Marshal's office.

THE TERRYS' DEFEAT AND PUNISHMENT

In the nearly deserted courtroom Justice Field concluded the reading of the opinion. The court ordered that the earlier federal decree stand revived in the name of Frederick Sharon as executor, so as to give him the full benefits, rights, and protection of the decree, and full power to enforce it against the Terrys at all times and in all places and particulars. Previously both the state and federal courts had avoided a direct decision on the question of conflicting state and federal jurisdiction over the controversy. Justice Field ruled that since Senator Sharon had first commenced his action, the jurisdiction of the federal court had attached first, and therefore the right of Sharon or his representatives to prosecute his suit to a final determination could not be defeated or impaired by any proceeding in any other court. He held that any state court decision involving the same subject-matter must be subordinate to the federal decision, and that the federal court had power

to issue injunctions or other process which might be essential to give effect to its paramount jurisdiction.

After the noon recess the court took up the matter of the Terrys' outrageous conduct. Both were held in contempt of court and Terry was sentenced to six months and Sarah to thirty days in jail.* Application by Terry to President Cleveland for a pardon, an appeal to the Supreme Court of the United States, and an effort to obtain commutation of Terry's sentence were all in vain, and both the Terrys served their full sentences. Thereafter they were faced with criminal indictments growing out of their courtroom conduct.

Not long after the Terrys were released from jail, their fortunes received further body blows. The Supreme Court of the United States affirmed the Circuit Court's decision in the revivor suit. On July 17, 1889, the Supreme Court of California unanimously ordered a new trial of the Sharon divorce action. Since the law at that time permitted an appeal from the judgment and an appeal from a motion denying a new trial, the court had a second bite at the apple. Also, in the eighteen months between the decision of the two appeals, three of the four judges who had voted for Sarah on the first appeal had ceased to be members of the court. One may sympathize with Terry's despairing exclamation to a friend, "The Supreme Court has reversed its own decision and made my wife out a strumpet." Certainly the judge had a mighty struggle with the doctrine of the law of the case. The principal opinion concluded that in the former appeal it had been held that the findings supported the judgment; whereas in the second appeal the question presented was whether or not the findings were sustained by the evidence. At all events, the court concluded that Section 55 of the Civil Code meant that parties "should so conduct themselves toward each other as to give evidence to those with whom they might come in contact that they were husband and wife." Sarah's purported marriage contract had been fortified only by secret cohabitation, and her evidence was held insufficient to show marriage. The court also held unanimously that Judge Sullivan had erred in striking out the testimony of a young attorney who had testified that in March, 1883, Sarah and a friend had discussed with him the bringing of an action against Sharon for *breach of promise* of marriage.

---

*Cf. the recent action of Federal Judges Medina and Harris.

MOUNTING TENSION AND CONFLICT

Both in and out of jail the Terrys continued to threaten dire consequences to Justice Field if and when he returned to California. Terry, by means of letters and publications, sought to uncover old gossip and scandal about Justice Field, although he had never before the Sharon cases, criticized Field's conduct or integrity. The threats of the Terrys were continuing, open and notorious, and the flames were fanned by the press to the point where in the minds of many people it was only a question of when and where the Terrys would have their revenge. Justice Field was at this time 72 years old and so lame as the result of the aggravation of a youthful injury that he could scarcely walk unassisted. The family and friends of Justice Field begged him in vain not to return to California to perform his duties in the summer of 1889. He was also urged to arm himself against a possible assault. His reply is worthy of quotation: "No, sir," he said, "I will not carry arms, for when it is known that the judges of our courts are compelled to arm themselves against assaults in consequence of their judicial action, it will be time to dissolve the courts, consider government a failure and let society lapse into barbarism." Nevertheless, when the situation came to the attention of the Attorney General of the United States, he

urged the United States Marshal in San Francisco to take unusual precautions for the protection of Justice Field. After considerable correspondence the Attorney General directed the employment of a special deputy, and David Neagle was designated to attend Justice Field both in and out of court while in California to protect him from any attack of the Terrys.

On August 13, 1889, Justice Field took the Southern Pacific train from Los Angeles to San Francisco, where he was scheduled to hold court. Terry also was to appear in court in San Francisco the next day. That evening Neagle, Field's bodyguard, observed the Terrys board the train at Fresno. At about seven the next morning the train stopped for breakfast at the town of Lathrop, about one hundred miles east of San Francisco. Justice Field, against the urging of Neagle, entered the station restaurant, and with Neagle, took a seat near the center of the restaurant. A few moments later, the Terrys entered and Sarah immediately saw Justice Field. She informed Terry; the two spoke a few words, and Sarah hurried from the room to obtain her satchel containing her gun, while Terry seated himself at a table about twenty-five feet away from Justice Field. Presently he got up and walked down the aisle behind Justice Field and Neagle, pausing a moment directly behind Field. The latter was unaware of Terry's presence until Terry suddenly struck him two hard blows, one in the face from behind and the other on the back of the head. Neagle, who had seen Terry stop, leaped to his feet and stepped between Terry and Field crying, "Stop, stop, I am an officer." Neagle had just time to observe "a terrible, desperate expression" on Terry's face and to see Terry's upraised arm move towards his breast as if to draw the knife Neagle had helped to take from him in the courtroom the year before. With his right hand extended, Neagle drew his gun with his left and fired twice in rapid succession, killing Terry instantly.

SARAH'S FINAL STRUGGLES

The same evening Sarah, although she had not been present when the fatal shots were fired, charged Justice Field, as well as Neagle, with the murder of her husband. Incredible as it may seem, the Justice of the Peace of Stockton Township issued a warrant for the arrest of a Justice of the Supreme Court of the United States on a charge of murder, and Justice Field was actually arrested in San Francisco. A petition for a writ of habeas corpus was immediately presented to the United States Circuit

Court; to the surprise of few people, Justice Field was released under bond. Governor Waterman of California intervened, pointing out that the arrest of Justice Field "will be a burning disgrace to the state unless disavowed," and the criminal proceedings against Field were dismissed before the habeas corpus proceedings were brought to a conclusion.

Neagle was arrested on the train and lodged in the county jail at Stockton. This was Terry's home town, and partisan feeling among Terry's friends ran high. There was serious danger that Neagle would be lynched before he could be brought to trial, or if not, that he would be convicted of murder by a Stockton jury sympathetic to Terry. This situation led to another bitter and legally significant struggle involving conflicting state and federal power. Habeas corpus proceedings were instituted in the federal court in San Francisco and Neagle was taken there. The case was elaborately presented and argued, both on the question of the guilt of Neagle and on the question of the power of the federal court to order his release without trial in the state court. The argument of Neagle's counsel prevailed, and the case was appealed to the Supreme Court of the United States. Joseph H. Choate

presented the leading argument on behalf of Neagle, and in a six to two decision the Supreme Court upheld the action of the Circuit Court. Justice Miller said in summation:

> "The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field, while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in doing so; and that he is not liable to answer in the courts of California on account of his part in that transaction."*

IN CONCLUSION

After the death of Terry, Sarah suffered defeat after defeat before the divorce litigation finally ended three years later. The Supreme Court of California refused to permit recovery on Sarah's judgment for alimony and costs, finally recognizing the binding force of the federal court injunction. The court also denied a recovery from "Lucky" Baldwin and Lloyd Tevis, who had been Sharon's bondsmen on Sharon's first unsuccessful appeal from the divorce and alimony judgment. The divorce action was retried before another state judge, who found that the marriage contract was a forgery and fraudulent; that Sarah had never been Sharon's wife; and that she had no right or claim to his property. An appeal was taken from the judgment but was dismissed in October, 1892. Very possibly Sarah never realized the completeness of her defeat. Early in 1892 she was adjudged insane and spent the last forty-five years of her unhappy life in the Stockton State Hospital for the Insane.

While the ultimate result of the Sharon cases no doubt constituted essential justice, the decisions, as a whole, leave room for doubt as to the efficiency and objectivity of the courts of the 1880's. Nevertheless, whether viewed as legal history, or as an illuminating chapter in the post-pioneer era of California, or a study of conflict among colorful characters of iron will and strong emotions, the Sharon cases deserve a backward glance.

---

*34 L. Ed. at 75-76.

MORAL TURPITUDE

(Continued from page 132)

He was unable to reconcile in principle the majority's ruling that the embezzled funds were not taxable with their concession that if Wilcox had invested rather than gambled them away he would have been liable for tax on any profits.[10]

Warming to his task Justice Burton pointed out many other decisions wherein unlawful gains had been held taxable; for example, several cases involving profits from illicit traffic in liquor,[11] bookmaking,[12] card playing,[13] unlawful insurance policies,[14] illegal prize fighting pictures[15] and lotteries.[16]

He recalled the case of one Chadick, a County Commissioner in Texas, who was convicted for failing to pay income on certain alleged bribes received by him in connection with road contracts.[17]

Finally he mentioned the intriguing case of one Murray Humphreys.[18]

MR. HUMPHREYS

Humphreys was a native of Chicago. Aside from a few years in Oklahoma (including six months in the house of correction for petty larceny) and about one year in Mexico where he had fled for the purpose of avoiding arrest under an indictment for income tax evasion, Humphreys had apparently spent all of his life in the Windy City.

In 1929 a group of six wholesale dry cleaning establishments in Chicago began to experience serious labor difficulties. In desperation they finally took the advice of a "Doctor Ginsburg" to engage the services "of a party who had influence with the unions." For $10,000 to be paid in weekly installments, this "party" (who, inci-

---

10. Commissioner v. Wilcox, *supra*, text, 756 (L. Ed.) citing Johnson v. United States, 318 U. S. 189, 87 L. Ed. 704; United States v. Sullivan, 274 U. S. 259, 71 L. Ed. 1037; Caldwell v. Commissioner, 135 F. (2) 488, etc.
11. Steinberg v. United States, 14 F. (2) 564; Maddas v. Commissioner, 40 B. T. A. 572, affirmed 114 F. (2d) 548; Poznak v. Commissioner, 14 B. T. A. 727.
12. McKenna's Appeal, 1 B. T. A. 326.
13. Weiner v. Commissioner, 10 B. T. A. 905.
14. Patterson v. Anderson, 20 F. S. 799.
15. Rickard v. Commissioner, 15 B. T. A. 316.
16. Droge v. Commissioner, 35 B. T. A. 829; Huntington v. Commissioner, 35 B. T. A. 835; Voyer's Appeal, 4 B. T. A. 1192.
17. Chadick v. United States, 77 F. (2) 961, certiorari denied 296 U. S. 609, 80 L. Ed. 432.
18. Humphreys v. Commissioner, 42 B. T. A. 857, affirmed 125 F. (2) 340.

dentally, turned out to be Humphreys) promised and achieved remarkable success in quelling the difficulties of all parties until one of them failed to make its weekly payment. That company began to receive threats and finally its plant was broken into and its contents liberally sprinkled with acid—damage about $20,000. Meanwhile the other five parties to the arrangement upped their weekly ante to make up the deserter's pro rata share, thus continuing undisturbed.

Prior to this excursion into drying cleaning affairs, Humphreys had never been employed by or engaged in the industry. This connection however apparently spurred his ambition to acquire a proprietary interest rather than to continue in a merely "protective" capacity. One of his flock after being informed that "they . . . (might) pick on him and tie him up and such as that" acceded to a suggestion that Humphreys become a part owner of his business—it being understood, of course, that the new partner was not expected to pay for his interest (which was estimated to be worth $5000). Thereafter, of course, only four dry cleaning establishments bore the burden of the weekly payments.

AL CAPONE "AND THEM"

Bored after a while with the new enterprise, Humphreys turned his talents to a different field. In the early evening of December 21, 1931, Robert G. Fitchie, president of the Milk Wagon Drivers Union,[19] was kidnaped from his home in Chicago. Two days later friends left $50,000 in the front seat of an automobile of whose location they had been advised. As a result Fitchie gained his freedom and Humphreys (who according to the evidence picked up the money[20]) became a wealthier man.

---

19. Humphreys also had some kind of an interest in Meadowmoor Dairy at Chicago because on one occasion he contacted the officials of that union about obtaining drivers for that Dairy. The point is interesting because in 1935 the Dairy had trouble with the union which led to the famous case of Milk Wagon Drivers etc. v. Meadowmoor Dairies, Inc., 21 N. E. (2) 308; 312 U. S. 287, 85 L. Ed. 836, in which the United States Supreme Court approved an injunction against picketing accompanied by extreme and repeated acts of violence. In justice to Humphreys the United States Department of Justice advises that he started the service of an eighteen month sentence for tax evasion on October 26, 1934, and was conditionally released on January 8, 1936. Inasmuch as he was thus otherwise engaged at the time of this strike, he certainly cannot be charged with any responsibility for the violence which accompanied it. In view of his previous activities it seems not unreasonable to suppose that if he had been at large he might have been able to "protect" the Dairy Company.
20. One of Humphreys' companions at the scene of the pickup of the ransom

Pangs of conscience apparently began to bother Humphreys along about this time (which was strangely coincident with Al Capone's come-uppance),[21] because on March 15, 1932 the collector of Internal Revenue at Chicago received Humphreys' first income tax return. It covered the year 1931. Imagine the Collector's gratification when, on April 5 of the same year, he received returns covering Humphreys' operations in 1928, 1929 and 1930.

Back in 1928 Humphreys had spent most of his time "just hanging around with Dave Ostran and them" who were engaged in the beer business; in addition he had an interest in a restaurant. In 1929 he had disposed of that interest and in 1931 established some kind of a connection with the General Market House. The character of its business and particularly the nature of Humphreys' services do not clearly appear in the record.

THE EXECUTIVE TYPE

In any event his returns for 1928 and 1929 described him as a "restaurateur." In 1930, for the General Market House, he became an "Inspector" and a "Superintendent" in 1931. In the 1932 returns he proudly (and perhaps justifiably) announced himself as an "Executive." Unfortunately, however, Humphreys forgot to inform the accountants who prepared his returns that in addition to restauranting, inspecting, superintending and executing,[22] he had the rather lucrative sidelines previously described. This oversight proved fatal. Although as noted by the Board of Tax Appeals members before whom the case was tried "the witnesses were greatly agitated," there was sufficient evidence to hold Humphreys liable for income tax on the protective payments, the dry cleaning business interest and the ransom money. In

---

money was identified as George "Red" Barker, who subsequently was killed in gang warfare. Inquiry indicates he was not member of the kidnapping Barker family of which a son "Fred" and mother "Ma" were located in a hideout near Lake Ocklawaha, Florida, in the spring of 1935 and killed by FBI agents in the ensuing siege.

21. Humphreys admitted to a friendliness for Al but emphatically denied any business connection. "I used to like to go up there and talk to him and things," he said, "but I had no affiliations." (42 B. T. A. text 866.)

22. Before the Board of Tax Appeals he added "Arbitrator" to the list and mentioned "services" rendered to the dry cleaning establishment in which he had acquired the gratuitous interest. In respect of the latter the Board commented that while his testimony concerning the nature and extent of these "services" was too indefinite to be of any assistance he (Humphreys) was at least definite about calling at the plant each week for his pay. (Text 863.)

addition, a 50% penalty for wilful intent to evade was assessed against him.[23]

The report of the case makes interesting reading, relating as it does to an era which Chicagoans, it is to be supposed, fervently hope will not repeat itself.

Adverting to Mr. Wilcox, the embezzler, (which seems appropriate at this point), even though he escaped tax liability, he was convicted in the State Court and sent to prison. After serving about one year of a 2 to 14 year sentence he was paroled. Presumably he went forth to sin no more.[24]

MR. COHEN AND MR. CARNAHAN

There are, of course, a number of other cases involving the taxability of income derived from illegal sources. Among them and of passing interest are the cases of Mose Cohen[25] and Robert L. Carnahan.[26]

Sedgwick County, Kansas, was the scene of their reputed activities and they, like our friend Murray Humphreys, "came a cropper" because when they finally got around to filing tax returns they either overlooked, understated, or misrepresented the nature, extent and sources of their income. Again like our friend Humphreys they exhibited a surprising aptitude for furnishing "protection." The efforts of Cohen and Carnahan in that direction were exerted in favor of persons who were engaged in catering to the tastes of individual Kansas citizens rather than observing the laws of that Commonwealth. According to Judge Van Fossan of the Tax Court, before whom the cases were tried, "all reasonable inferences from the situation tend(ed) to support the testimony that no 'place' could operate in Sedgwick County without paying Cohen and to pay Cohen was to pay Carnahan." By "place" His Honor meant "night clubs where liquor was sold and gambling carried on, the operation of slot machines . . . establishments where bets could be placed on horse racing in all parts of the country," all of which were in violation of the laws of Kansas. He commented, in passing, that most of the witnesses (presumably those called by the taxpayers) "came from that lawless fringe of

23. Our friend Humphreys also pleaded guilty to a criminal indictment for attempting to evade tax, and was sent to prison (125 F. (2) Text 342).
24. Wilcox v. Commissioner, *supra*, (L. Ed. Text 754).
25. Cohen v. Commissioner, 9 T. C. 1156.
26. Carnahan v. Commissioner, 9 T. C. 1206.

society where arrest and the serving of time for law violations are common occurrences. The crimes of which these witnesses had been convicted, Judge Van Fossan noted, "ranged all the way from bootlegging to cattle rustling."

Placing considerable weight upon the fact that in the United States District Court, Messrs. Cohen and Carnahan had pleaded nolo contendere to criminal indictments charging fraudulent evasion of liability upon the same items of income which they had neglected to mention in their returns, the Tax Court affirmed large deficiencies.

One particularly interesting aspect was Carnahan's attempt to ride the coattails of one Jennings[27] who some years earlier had successfully skirted the statutory provision[28] that individual wagering losses can only be used as an offset against personal wagering gains. Jennings had convinced the Circuit Court of Appeals that while he had done pretty well on betting for his own account, nevertheless, a gambling partnership in which he was a member, had done correspondingly badly and that the latter losses should be offset against the former gains.

At the hands of the Tax Court Carnahan didn't do so well with a similar contention. He claimed that he was in "partnership" with the various night clubs, etc., from whom the greater portion of his income was derived because he had furnished them with the necessary "bank roll" to commence business. Inasmuch as this created a partnership he claimed that he should be permitted to offset against its gambling gains the huge sums which he had lost on personal wagers.

Judge Van Fossan rejected this contention on two grounds. In the first place, he said, the evidence did not show how much of the night club income was derived from gambling. In the second place he was unable to discern any elements of a partnership. If Carnahan got his foot in the door, he said, by advancing "bank roll" money to operators in need of mere temporary financing "why was the money so advanced not treated as a loan and paid back and the debt discharged as soon as the club proved profitable." If the payments to Cohen and Carnahan were not a form of tribute, he asked, "why did the club owners continue to pay, year after year, some as high as 75% of the earnings, amounting to

27. Jennings v. Commissioner, 110 F. (2) 945.
28. 26 U. S. C. A. 23(g).

many times the sum claimed to have been advanced as the 'bank roll'?" He concluded that the payments were purely for protection.[29]

Another case of interest is that of Horace Mills,[30] who enjoyed the concession to operate slot machines (outlawed by State law) in various clubhouses of the Loyal Order of Moose in the State of Ohio. Under his contract the local lodges got 75% of the "take"; 5% was remitted to the State Association and Mills kept the remainder.

Mills duly reported his 20% to the Treasury Department as gross income. The Commissioner, however, attempted to tax as additional income to him the 5% which Mills had remitted to the State Association. The Tax Court would not go along with the Commissioner on that score but it did disallow as an "ordinary and necessary business expense" deduction some $1400 which Mills had spent buying smokes and drinks for lodge members who "happened" to be around when the machines were opened to collect their "take."

As should have been noted from the foregoing, the mere fact that the source of one's income is illegal does not by any means exempt such income from taxation. The embezzler apparently is the only adjudicated exception to this general rule. In other words, except for Mr. Wilcox and his ilk, one whose gains derive from activities or sources beyond the pale of the law is in no better position to avoid tax because the source was illegal than was the parricide who asked for leniency because by murdering his father he had made himself an orphan.

BUSINESS EXPENSE CAN BE EXPENSIVE

Having fairly well explored the subject of income where moral turpitude was involved, let us now turn to the opposite side of the ledger, *i.e.*, outgo in the form of an alleged "business expense," the payment of which is contrary to public policy. Such items frequently have been claimed as deductions. With a corresponding frequency, they promptly have been disallowed.

Consider the sad case of Israel Silberman.[31]

Israel had a paint and varnish business from which, in company

29. A conclusion subsequently strengthened by the evidence in Comeaux v. Commissioner, 10 T. C. ....., No. 29. Comeaux was one of the protectees.
30. Mill v. Commissioner, 5 T. C. 691.
31. Silberman v. Commissioner, 44 B. T. A. 600.

with other legitimate sources, he realized the rather substantial income of $28,000. Being an enterprising fellow who liked to utilize his spare time, he also operated handbooks at various New York race tracks. To maintain these he paid out sizeable sums for booth rental and salaries to clerical employees. The total so expended was about $12,500. Notwithstanding a pretty substantial handle, Israel wasted both his time and his money because his customers "out-handicapped" him to such an extent that whereas he took in $330,000, he paid out $339,000.

The only bright spot in an otherwise gloomy picture was Silberman's belief that for income tax purposes he could offset the expenses incurred to operate the outlaw against his $28,000 legitimate income. (He did not try to claim the $9,000 deficit on actual wagering.)

The Board of Tax Appeals promptly disillusioned him, saying: ". . . If petitioner had realized income or gain from his illegal gambling transactions such gain would be subject to income tax. . . . In spite of the seeming inconsistency, even though income derived from an illegal business is subject to tax, *expenditures made in carrying on of activities which in themselves are in contravention of law and illegal . . . (are) . . . not deductible as business expense on grounds of public policy . . .*[32] In United States v. Sullivan (*supra*) the taxpayer argued that income from an illegal business is exempt from tax and that he did not have to file income tax returns. There was an illusion to the problem of expenditures made in pursuit of the unlawful business and, commenting on that, Justice Holmes said: 'It is urged that if a return were made the defendant would be entitled to de-

32. This rather broad language would seem to indicate that where an illegal business is concerned, no expense incident to its operation may be deducted. In this connection, however, see Commissioner v. Heininger, 320 U. S. 467, 88 L. Ed. 171, wherein the Supreme Court said: "The language of . . . (the statute) . . . contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible. And the brief of the Government in the instant case expressly disclaims any contention that the purpose of the tax laws is to penalize illegal business by taxing gross instead of net income." That case involved a dentist whose mail advertisements were banned by the Post Office Department and for income tax purposes he claimed legal expenses incurred in fighting the ban. But see also Anthony Stralla v. Commissioner, 9 T. C. 801, in which the Tax Court discussed the above language and distinguished its application as between an advertising dentist and the operators of a gambling ship off the coast of California. Many cases relating to the non-deductibility of legal fees for defending one accused of crime, fines, etc., are collected there.

duct illegal expenses such as bribery. This by no means follows but it will be time enough to consider the question when a taxpayer has the temerity to raise it.' "

Some years later, and apparently unaware of Mr. Justice Holmes implied warning, one Frank Maddas[33] exhibited that temerity. He sought to deduct amounts allegedly paid to certain prohibition officials as consideration for their pretended absorption in other matters when Frank's beer trucks rolled past. It goes without saying that the Board of Tax Appeals made short shrift of the contention.

Then there was the case of Lawrence Wagner[34] whose business of loaning money at 10% per month was rudely broken up when the District Attorney of Wayne County, Michigan, raided it and confiscated all the records, etc. The borrowers, thus released, darkened Wagner's doors no more. He claimed as a deduction the loss of his investment. He got nowhere.

COMMERCIAL BRIBERY

Let us now turn to the case of the taxpayer who, while his business is legal, nevertheless finds it expedient to make certain payments which, although contrary to public policy, are calculated to improve business conditions.

In this category the case of Kelley-Dempsey & Co.[35] is one of consuming interest because it demonstrates how hapless was the situation in which at least one contracting firm found itself.

Kelley-Dempsey & Co. had a contract to lay pipe for a gas company in Oklahoma. Under the agreement the work had to be accepted and approved by inspectors of the Gas Company. The latter was required to furnish and deliver the materials.

The contractor (Kelley-Dempsey) began to experience considerable difficulties. There were delays in the delivery of materials. The inspectors would permit pipe to be laid without objection and later on require it to be uncovered and relaid even though properly done in the first place. In various and sundry other ways the inspection became a series of harassing, time consuming and money wasting events.

A complaint to the Gas Company resulted in the suggestion by its Chief Engineer that if an inspector named Evanoff were to be placed on the Kelley-Dempsey payroll (he, of course, to continue

33. Maddas v. Commissioner, 40 B. T. A. 572.
34. Wagner v. Commissioner, 30 B. T. A. 1099.
35. Kelley-Dempsey & Co. v. Commissioner, 31 B. T. A. 351.

as a gas company employee), the trouble would probably cease. Evanoff thereupon assumed the dual role of an "honorary" pipe layer (at $10.00 per day) for Kelley-Dempsey and an inspector for the Gas Company. The trouble promptly ceased and progress was rapid for the remaining six months required to complete the work.

Meanwhile Kelley-Dempsey obtained another contract from the Gas Company. Before work commenced, one Gaston suggested that if he were put on the contractor's payroll he could assure harmony. Gaston was able to offer this assurance because as the Chief Inspector for the Gas Company he probably considered himself to be a more appropriate liaison than his subordinate Evanoff. Reluctantly but inevitably Gaston was promised and thereafter received $1,075 for "fair inspection."

The story does not end here because the Gas Company had another employee—one Van Hook—who as its Assistant Chief Engineer was in general charge of construction activities.

Doubtless impressed by the splendid inspection service which his colleague Gaston was performing, he began to wonder if his own activities might not be improved to the benefit of Kelley-Dempsey. Taking counsel with himself he concluded that such was not unreasonable to expect and having so concluded he passed the thought on to the contractor with the suggestion, of course, that such improved service naturally should be rewarded. It was to the tune of some $34,412.39.

Thereafter Kelley-Dempsey Co. deducted these honorariums from its gross income.

The deduction was disallowed, the Board of Tax Appeals saying:

"The testimony tells a tale of graft. Petitioner was held up and had to pay. . . .

"No doubt that was the easiest and quickest way out of its difficulties but it was not *necessary* for petitioner to adopt that course. The courts were open to it, wherein it could have proved the substantial performance of its contracts and demanded payment therefor. Moreover, the laws of Oklahoma afforded it protection against extortion—if the threats and solicitations of Van Hook and the others amounted to that—by the punishment provided for those attempting it. To be sure, the prosecution of proceedings against the gas company for the enforcement of petitioner's rights under its contract would have been expensive, per-

haps tedious, and probably would have resulted in the loss of any future business with that company. And the instigation of criminal prosecution of the gas company employees for such of their acts (if any) as were unlawful would be troublesome and disagreeable. But, for all this record tell us, the normal business conduct of the group, the community, would have made the doing of *these* things *necessary,* and not the adoption of the course chosen by petitioner—the 'paying of tribute' as it is described on the record.

"Moreover, to encourage the accession to demands of this sort, both morally and legally wrongful, by straining the common meaning of the words of the statute to permit such payments to be deducted as ordinary and necessary expenses of operating a business would be poor public policy."

MR. RUGEL AND MR. PENDERGAST

Consider also the case of one Blake B. Rugel[36] who was the representative of a firm selling revenue stamps to be affixed to packaged liquor.

The state of Missouri was on his list of presumably satisfied customers and affairs were progressing nicely until one day he discovered that the State had given an order for a sizeable stock of stamps to one of his competitors. Spurred by more than mere idle curiosity, Mr. Rugel discovered that the State Supervisor of Liquor Control had patronized the competitor at the suggestion of a personal friend of his, one Doherty.

Doherty was engaged in the wrecking business and if Rugel was puzzled that one following that line of endeavor should be interested in such a completely foreign subject as revenue stamps, the riddle was solved by the revelation that Doherty was a precinct captain in the Pendergast political organization.

As Rugel subsequently testified, "I knew I couldn't get the remainder of that business unless I had Mr. Doherty working with me."

Acting accordingly Mr. Rugel paid to Doherty the sums of $18,763.27 in 1937 and $14,157.70 in 1938, and deducted the same on his income tax returns under the guise of "commissions and brokerage."

---

36. Rugel v. Commissioner, 127 F. (2) 393.

Affirming the Board of Tax Appeals in disallowing the deductions, the Circuit Court of Appeals held there was no doubt from the evidence that Doherty "was being paid solely upon the basis of his political influence and control," there being evidence that Doherty divided the spoils "with his political boss Pendergast."

"Payments," said Judge Johnson, "made as the mere purchase price of political influence to obtain or hold political contracts cannot soundly be recognized as constituting 'ordinary and necessary expense' of business operations within the meaning of and subject to deduction under . . . (the statute)."[37]

BRIBERY OF UNION OFFICIALS

Last, but not least, comes the case of taxpayer who finds himself embroiled in a labor dispute.

Typical is the very recent experience of Excelsior Baking Co.[38]

Encountering difficulties with its unionized drivers it was informed that a Mr. Bernstein could solve their problems. This individual when contacted was duly sympathetic. He offered to become downright solicitous if permitted to distribute some $12,000 to $15,000 among certain unidentified "connections." A down payment was made. The record does not disclose whether the Bakery Company officials were elated or dispirited to learn a few days later that Bernstein was a member of the notorious Purple Gang of Detroit.

In any event emissaries from Bernstein appeared and from time to time received payments aggregating $13,000. These payments were either delivered on street corners or to occupants of automobiles who parked at designated times and places. Notwithstanding, Excelsior's situation continued unimproved.

Prior to this episode the Bakery Company's regularly retained attorneys had successfully handled its labor matters for fees ranging from $200 to $500 annually. When Messrs. Bernstein *et al.*, failed to produce, these attorneys were called back into the picture and they succeeded in settling the dispute.

---

37. *Cf.* Easton etc. Co. v. Commissioner, 35 B. T. A. 189, and New Orleans etc. Co. v. Commissioner, 35 B. T. A. 218 (payments to one close to State Administration); Nicholson v. Commissioner, 38 B. T. A. 190 (payments to State Senator); Textile Mills etc. v. Commissioner, 314 U. S. 326, 86 L. Ed. 249 (publicity, propaganda and lobbying expense to obtain passage of favorable legislation).
38. Excelsior Baking Co. v. United States (D. C. Minn.), decided Jan. 13, 1949, ... F. S. .....

Excelsior was, of course, denied the right to deduct its contribution to the Purple Gang upon the obvious ground that such payments were contrary to public policy.

Finally and illustrative of the other side of the labor picture, there is the case of Richard Law.[39]

Law was employed as a high climber and rig-up hook tender by M & B Logging Co., also as business agent for the union to which he belonged.

A lumber export company operating in the area had charter contracts covering a number of vessels. These contracts contained rigid strike clauses which provided for cancellation of the charters in the event strikes prevented the prompt loading of ships. The export company estimated that a strike resulting in such charter cancellations could cost them about $200,000. These estimates were not made in a moment of idle calculation. They were impelled by the rumor that Law's union, then on strike against the loggers, was threatening to put up picket lines around the docks and thus prevent loading.

To make a long story short, the export company paid out $6,500 in exchange for a guaranty that there would be no picket lines. According to the evidence Law got the money. The deficiency affirmed against him by the Tax Court included not only the tax upon the $6,500, but also a 50% fraud penalty for failing to report it on his income tax return.

CONCLUSION

The reader may have been disappointed that this discussion did not contain direct suggestions on how to save tax dollars. In that connection, however, it should have been demonstrated that while the Treasury Department is not at all finicky about sources of income, it exhibits considerable indignation over deductions which violate the moral code. Thus, by inference at least, the article suggests the saving of appreciable sums by way of the penalties and interest which usually accompany deficiencies arising out of either a failure to report illegal income or the deduction of disbursements made under the mistaken assumption that in the eyes of the Treasury expediency outweighs public policy.

In any event, the author hopes it reveals that tax cases are not always dry as dust nor entirely devoid of human interest.

---

39. Richard Law v. Commissioner, 2 T. C. 623.